NO. 83-5792

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1983

JEFFREY LEE GRIFFIN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

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STATUTES

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TO THE HONORABLE JUDGES OF THE SUPREME COURT
OF THE UNITED STATES:

NOW COMES, JEFFREY LEE GRIFFIN, Petitioner, in the above entitled and numbered cause and by and through his attorney, STANLEY G. SCHNEIDER, and moves that he be permitted to file the attached application for writ of certiorari in forma pauperis and to proceed in forma pauperis.

QUESTION PRESENTED

Whether Appellant initiated communication with the police and knowingly and intelligently waived his Fifth, Sixth and Fourteenth Amendment right to counsel after requesting assistance of specific counsel.

JURISDICTION

The Court of Criminal Appeals rendered its decision on May 25, 1983. Petitioner timely filed a Motion for Leave to File Motion for Rehearing and Motion for Rehearing which was denied on September 21, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 §(3). Petitioner having asserted below in asserting here defamations of rights secured by the Constitution of the United States. The decision of the Court of Criminal Appeals was clearly based on the Fifth, Sixth and Fourteenth Amendments of the United States Constitition and the Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d. 378 (1981).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

PROCEEDINGS IN THE TRIAL COURT:

On March 29, 1979, Petitioner was charged by indictment with the felony offense of capital murder under V.T.C.A. Penal Code §19.03(a)(2). The case was submitted to the jury on the first paragraph of the indictment alleging that the Petitioner caused the death of David Sobotik, by cutting and stabbing him with a knife while in the course of attempting to commit a robbery. Petitioner was found guilty of capital murder as alleged in the indictment by the jury. The jury answered the two questions under V.A.C.C.P. Art. 3707 affirmatively, and the Court assessed Petitioner's punishment at death. The Texas Court of Criminal Appeals, P.J. (Onion dissenting,) (5-4), summarized the facts of the case as follows:

> In the instant case, the record shows that the Appellant asked to talk to his attorney. He conversed over the telephone with attorney, Jennings, for 5-10 minutes. Upon subsequent inquiry by the police offices, he told them he had talked with his attorney. Shortly thereafter attorney, Jennings, called back and talked to Appellant. After the telephone conversation terminated, the police officers reentered the interview room and asked what happened. When informed by Appellant that attorney Jennings was not going to represent him, he was asked by police officers if he wanted to call another attorney. His response according to the State's testimony, was that "he just didn't want to talk to any lawyers right now". Thereafter Detective Kent came into the room and asked to interview the Appellant. The other officers left and the confession followed."

There is no dispute as to the fact that before Petitioner confessed to the commission of the three murders to Houston Police Department Detective Kent, Petitioner requested to talk to a lawyer. Petitioner was allowed to call Houston attorney, Tom Jennings, who has previously represented Petitioner. Petitioner

talked to attorney Jennings privately for about 5-10 minutes (Vol. 8, p. 3570-73). A second telephone conversation then followed in which attorney Jennings declined to represent Petitioner. Petitioner testified that at the Motion to Suppress Hearing that he told attorney Jennings that he wanted to be represented by a lawyer (Vol. 8, p. 3643, v.4-5). Petitioner was not furnished with an attorney or taken before a Magistrate for appointment of counsel after Mr. Jennings declined representation.

Petitioner moved to suppress the confession and a knife discovered as a result of Petitioner's oral confession, however, after a hearing on the matter, the trial court denied the motion. (Vol. 8, pg.3684-86). Petitioner's objections to the admission of the State's Exhibits 1A, 2, 2A, 3, and 3A, statements of the accused and to State's Exhibit 8, a knife, were all overruled. At trial, Houston Police Detective G.C. Schultz testified that Petitioner had requested an attorney and wanted to stop the interview, (R.p.4364, lines 8-25):

> Q At any point in the time while you were interviewing the Defendant, did he make a request for an attorney?
>
> A Approximately -- right around 3:00 o'clock, he requested an attorney, at which time we stopped the interview.
>
> Q Can you tell the jury what his exact words were?
>
> A He stated, after we had talked to him a while about the incident that had happened out there, he stated that he wanted to consult with an attorney, and that he wanted to stop the interview and talk with an attorney before he went further, which we did stop the interview and got the yellow pages out to help him obtain a phone number to call an attorney.

APPELLATE PROCEEDINGS

Petitioner's conviction was automatically appealled to the Court of Criminal Appeals as provided in V.A.C.C.P. Art. 37.07 (1)(f). On appeal, Petitioner argued that the introduction of Petitioner's statement and a knife apparently used in the murders, a product of Petitioner's confession, violated Petitioner's right to counsel and freedom from self-incrimination under the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution. Petitioner's conviction was affirmed by the Court of Criminal Appeals in a 5-4 decision on May 25, 1983. The Court of Criminal Appeals held that Edwards, supra, was clearly distinguisable and overruled Petitioner's grounds of error stating:

> "... these facts contrast sharply with those of Edwards , supra, upon which Appellant relies. Appellant did not make a general request for counsel, as Edwards did. Appellant did not say he did not want to talk to the officers, as Edwards did. Appellant did not say he wanted to deal with the Police only through counsel, as Edwards did. Appellant's request to consult with his attorney was promptly and fully honored, as Edwards was not. Appellant was even asked by the officers if he wanted to talk to another lawyer after his previous lawyer declined representation, and Appellant expressly said he did not want to talk to any lawyer at that time; expressly declining to exercise the right he now asserts was denied him.

On Motion for Rehearing, Petitioner noted that the crucial issue as to whether Petitioner "initiated" the Police interrogation which resulted in the confession, or whether the Police "initiated" the contact, was not addressed by the majority opinion. The court was also advised of its recent decision in Oregon v. Bradshaw, ____U.S.____, 103 S.Ct. 2830, ____L.Ed.2d (1983). Nevertheless, the Court of Criminal Appeals denied Petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

I.

OVERVIEW

In the majority opinion, the court of Criminal Appeals incorrectly applied the principles set forth in Edwards v. Arizona, supra, in affirming Petitioner's conviction. The Court held that because Petitioner did not make a general request for counsel, but rather requested the assistance of specific counsel, who then later rejected him, and did not tell the police officers he would talk to them only through counsel, he had failed to exercise his right recognized by this Court in Edwards. The sole basis for the Court of Appeals decision was that the facts in Edwards, supra, were distinguishable from the facts in

Petitioner's case. The Court failed to address whether Petitioner had "initiated" contact with police after asserting his right to counsel and whether Petitioner had knowingly and intelligently waived his right to counsel as required in Edwards, supra, reaffirmed recently in Oregon v. Bradshaw, supra,

The dissenting opinion by Presiding Judge Onion, however, did address the issue of "initiation" and found that Edwards, supra, clearly applied. The dissent pointed out that the facts clearly demonstrated that Petitioner had not "initiated" the police contact which resulted in his confession and had not knowingly and intelligently waived his Fifth, Sixth and Fourteenth Amendment rights.

On rehearing, the Court of Criminal Appeals was asked to address the issue as to what constitutes "initiation" and was made aware of this Court's recent decision in Oregon v. Bradshaw, supra, by letter memorandum. The Court of Criminal Appeals, however, denied Petitioner's motion for rehearing without written opinion. Therefore, this Court should remand the case to the Texas Court of Criminal Appeals in order that the court may determine whether Petitioner did "initiate" the police contact which resulted in his confession and whether he "knowingly and intelligently" waived his Fifth, Sixth and Fourteenth Amendment rights to counsel in light of this Court's recent decision in Oregon v. Bradshaw, supra.

II.

By distinguishing Edwards v. Arizona, supra, from Petitioner's case, the Texas Court of Criminal Appeals has incorrectly applied the principles set forth by this Court in Edwards, supra, and recently reaffirmed in Oregon v. Bradshaw, supra.

This case presents the question as to when an individual in custody "initiates" conversation with the police such that it constitutes a knowing and intelligent waiver of his Fifth, Sixth, and Fourteenth Amendment rights to counsel. In Edwards v. Arizona, supra, this Court held that once the accused has invoked his right to counsel during custodial interrogation, a valid waiver of that right cannot be established by showing only that

he responded to further police initiated custodial interrogation, even if he has been advised of his rights, until counsel has been made available to him. As this Court in Edwards noted,

> "a waiver of counsel must not be only voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 1884; see also Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

Generally, courts are to indulge in every reasonable presumption against waiver. Brewer v. Williams, supra, at 1242; see also Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245,1246, 16 L.Ed.2d 314 (1966); Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 464, 86 L.Ed. 680. The Courts have further stated that this strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) the Court was faced with a similar situation in which the accused requested assistance of specific counsel. While in custody, Hinckley was asked to fill out a form consisting of four waiver questions. "(I)n response to the third question, whether he wished to answer any questions, Hinckley answered orally 'I don't know, I'm not sure, I think I want to talk to Joe Bates.' explaining that Bates was his father's attorney in Dallas, Texas. In response to the fourth question, whether he was willing to answer questions without an attorney present, Hinckley again responded verbally 'I want to talk to you, but first I want to talk to Joe Bates'." Id. at 120. After attempts were made to reach another attorney recommended by Mr. Bates, a Washington attorney named Vincent Fuller, two agents approached Hinckley and asked him to respond to certain background questions, which Hinckley did. In applying Edwards, supra, the D.C. Court of Appeals stated:

> Thus, if the Defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking. there can be no questioning," and, only last term, the Court reaffirmed the continuing vitality of these proscriptions. In Edwards v. Arizona, supra, the Court states that "an accused having expressed a desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel is made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Id, at 122. (Emphasis added).

The District of Columbia Court of Appeals then concluded that because the F.B.I. and Secret Service Agent had initiated the contact with Hinckley, the results and impressions concerning the interview were not admissible into evidence absent a showing that Hinckley initiated the conversations.

As the majority opinion noted, the facts of Petitioner's case can be distinguished from those of Edwards, supra, however, this does not mean that such conduct is permissible. This Court has never required that the general principles of Edwards, supra, be applied only in cases involving the exact same fact situation as found in Edwards, supra. Edwards, supra, stands for the general proposition that once an accused undergoing custodial interrogation indicates that he does not wish to speak to authorities without an attorney present, then no further interrogation may occur, unless the accused initiates the conversation. The burden is then on the State to prove that the accused has knowingly waived his right to counsel. In Oregon v. Bradshaw, supra, this Court recently clarified its holdings in Edwards, supra, stating:

> We did not there hold that the "initiation" of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel, we held that after the right to counsel has been asserted by an accused further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges, or conversations with the police" 451 U.S. at 485, 101 S.Ct. at 1885. This was in effect a prophylachc rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards, was. Id, at 2834.

See also Wyrick v. Fields, _____U.S._____, 103 S.Ct. 394, 74

L.Ed.2d 214 (1982) (per curiam) in which this Court restated its holding in Edwards, that "once a suspect invokes his right to counsel he may not be subjected to further interrogation until counsel is provided, unless the suspect himself initiates dialogue with the authorities." Id. at 395. This Court then went on to further state in Bradshaw, supra:

> But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel, 'is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. (Emphasis applied). This is made clear in the following footnote to our Edwards, opinion:
>
> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers' will say or do something that clearly would be "interrogation". In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486, n. 9, 101 S.Ct. at 1885, n. 9 (emphasis added). Id. at 2834.

Thus, once there has been "initation" of a conversation by an accused, it must also be found there was a valid waiver of the right to counsel and the right to silence, "that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances."

The facts of Petitioner's case clearly demonstrate that the requirements of Edwards, and Bradshaw, were not met. Petitioner specifically requested assistance of counsel. After contacting the attorney of his choice and being denied representation, Petitioner told police that he did not wish to talk to any lawyer right now. He never indicated that he wanted to talk to the police, nor did Petitioner "initiate" the conversation which resulted in his confession. After telling police that he didn't wish to talk to any lawyer at that time, Detective Kent went into the room, asked to interview Petitioner and obtained a confession. As noted in the dissenting opinion:

> It is clear from the testimony quoted by the majority that having exercised his right to counsel, appellant did not initiate further communication, exchanges or conversation with the police ... . It was the police who continued to initiate the conversation about the offense.

Therefore, because it is apparent from the record that Petitioner did not initiate the conversation with Detective Kent that resulted in his confession nor did Petitioner knowingly and intelligently waive his Fifth, Sixth and Fourteenth Amendment rights, the trial court erred in admitting Petitioner's confession and the knife, a product of the confession, into evidence.

CONCLUSION

Petitioner prays that this Court reverse and remand this cause to the Court of Criminal Appeals of Texas for further consideration in light of this C ourt's recent decision in Oregon v. Bradshaw, supra. Alternatively, Petitioner prays that Petitioner's Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was mailed to Leslie Benetiz, Assistant Attorney General of the State of Texas, Austin, Texas on this the 19th day of November, 1983.

STANLEY G. SCHNEIDER

TC-83-21-071

JEFFERY LEE GRIFFIN, Appellant

NO. 68,924 vs. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. After the jury answered affirmatively the issues submitted under Art. 37.071, V.A.C.C.P., punishment was fixed at death.

Appellant raises twenty five grounds of error, but they are grouped for argument into five distinct issues.

The first twelve grounds of error raise a single issue, one with respect to each person selected to serve on the jury. Each ground of error asserts

> "The District Court committed reversible error when it compelled Juror [named juror] to swear that the mandatory penalty of death or life imprisonment would not affect his deliberations on any fact issue."

We initially note that while these grounds of error challenge use of V.T.C.A., Penal Code Sec. 12.31(b), they do not assert erroneous exclusion of a juror under that section, as was the case in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581. To the contrary, appellant seems to assert that any use of Sec. 12.31(b) is constitutional error. Adams, supra, recognized that Sec. 12.31(b) may be used in a constitutional manner, and we perceive no error in the use made during selection of the jurors who served in appellant's case. Representative of the inquiry made of each juror in this case by the trial court is the following example:

> "THE COURT: Let me go back into something that has already been gone into. I want to ask you this and then I will let the other attorney ask you some questions.
>
> "You have been told now that the Defendant in this case is charged with an offense which is a capital felony, the offense being capital murder.
>
> "Now, on conviction, assuming there is a conviction, on conviction for a capital felony, a sentence of death or life imprisonment is mandatory, one or the other.
>
> "If you were selected as a juror in this case, it will be your duty not to let that

mandatory penalty for death or life imprisonment affect your deliberations on any issue of fact.

"Can you and will you perform your duty if you are selected as a juror in this case?

"THE WITNESS: I will.

"THE COURT: And can you carry out and follow your oath as a juror, if selected as a juror in this case?

"THE WITNESS: I can."

In any event, no objection was made at trial so nothing is presented for review. Cf. Battie v. State, 551 S.W.2d 401; May v. State, 618 S.W.2d 333. The first twelve grounds of error are overruled.

The next ground of error asserts improper exclusion of a prospective juror contrary to Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. Examination of this prospective juror occupies approximately fifty pages of the record. Early in the examination she indicated she was "moderately" opposed to the death penalty. In the course of a few pages she expressed conflicting positions:

"Q. Are you saying you are for the death penalty or against the death penalty?

"A. Well, I guess it really would depend.

"Q. Okay. Are you basically for people being put to death, or basically against people being put to death?

"A. I guess for.

"Q. You believe in the death penalty?

"A. Yes.

"Q. Okay. Can you tell me why you believe in the death penalty? What would be the reason that you would write down, on a piece of paper, if we gave you an essay and said: Tell us why you believe in the death penalty, or why you don't. What would your answer be? Got any ideas?

"A. No.

"Q. Okay. I think you had better ideas or you felt more stronqly against the death penalty, because you said you don't believe a person should take another person's life.

"Is that true?

"A. (Witness indicates.)

"Q. Is your answer yes?

"A. Yes.

"Q. There's not a button on there for a nod.

"I think you felt more strongly against the death penalty, because of the Bible which says: Thou shalt not kill. Would that be a fair statement?

"A. Yes.

"Q. Okay. Would it be a fair statement then that you do have feelings or principles against the death penalty?

"A. Yes.

"Q. All right. My question to you then is: Because of those feelings, would you, if you had to make a choice between life or death for punishment, would you automatically vote against the death penalty, even if you thought it was a proper case?

"A. Yes.

"Q. Is that because you don't want to send someone to death?

"A. Yes."

After explaining the punishment stage issues to the prospective juror, she was examined further on the matter of her opposition to the death penalty:

"Now, my question to you is: Even if I showed you facts, I proved to you beyond a reasonable doubt that the man deliberately committed the offense, he deliberately killed the man, and I proved to you it was probable that he was going to commit acts of violence in the future, because last year he killed somebody else, and the year before that, he had done another robbery, if you believed both of those questions to be yes beyond a reasonable doubt, would you still answer them no because of your personal feelings against the death penalty?

"A. Yes.

"Q. What is your answer to that question?

"A. Yes.

"Q. Okay. So no matter what evidence I showed you, no matter how horrible the crime, how many people had been murdered, you would still answer no so that he could receive life instead of death; is that true?

"I'm just making sure I'm understanding you correctly.

"Is that what you are saying?

"A. Yes."

Subsequently defense counsel examined her and she acknowledged the conflicting statements of her position that she had given:

"Q. You told us, at first, you don't believe in the death penalty.

"That's what you said; right?

"A. Uh-huh.

"Q. And you told us that feeling you have is not a real strong feeling, but a moderate feeling; is that correct?

"A. Yes.

"Q. Then, you told Miss Burkhalter that you did believe in the death penalty.

"A. Uh-huh.

"Q. I believe you told her that in response to a question that: Could you do it, in a proper case?

"A. Uh-huh.

"Q. Could you vote for the death penalty in a proper case if you were convinced beyond a reasonable doubt, as a juror, that the person deserved the death penalty?

"A. Well, I guess it would depend like on how many people he killed, you know, and what he did.

"Q. Let's say he killed three people, a real vicious way.

"A. Yes, I probably would, you know.

"THE COURT: Talk a little louder.

QUESTIONS BY MR. PIZZITOLA CONTINUED:

"Q. Let me say this to you now, Miss Jackson,--

"A. Uh-huh.

"Q. Do you see Jeffrey Lee Griffin sitting over there?

"A. Yes.

"Q. Okay. He is charged with a crime here today.

"A. Uh-huh.

"Q. But you're answering these questions--you're not answering them as they relate to Jeffrey Lee Griffin. See, we are not saying: Would you not put him to death, or would you put Jeffrey Lee Griffin to death. That's not the issue here.

"The question is: In just any case, what your general feelings are.

"I believe you told me that it would depend on maybe how many murders occurred.

"A. Uh-huh.

"Q. We can't tell you what the facts of Jeffrey Lee Griffin's case is, but in general, you could consider the death penalty, in a proper case; is that correct?

"A. Yes.

"Q. You could vote and answer the questions yes, if you believed in your heart, if you were convinced, as a juror, beyond a reasonable doubt that they should be answered yes, could you answer them yes?

"A. Yes.

"Q. And knowing the results of your answers, you could still answer those questions the way you believed they should be answered?

"A. Yes."

The court attempted to clarify the prospective juror's position, but without success:

"Say you have sat there and you have heard all this evidence, and you found the Defendant guilty beyond a reasonable doubt.

"You have heard more evidence concerning the penalty, and you say to yourself: The State has proved to me beyond a reasonable doubt that each of those questions must be answered yes.

"Now, can you answer those questions yes, if it has been proved to you beyond a reasonable doubt that the answer is yes? Could you answer them both yes, knowing if you did that, the Judge would have to assess the death penalty?

"Could you do that?

"THE WITNESS: I guess it would depend.

"THE COURT: Ma'am?

"THE WITNESS: I guess it would depend.

"THE COURT: What would it depend on?

"THE WITNESS: (No answer.)

"THE COURT: Would you answer those questions no, even though the evidence required you to answer them yes?

"I don't care what your answer is.

"THE WITNESS: It might.

"THE COURT: I couldn't care less.

"THE WITNESS: It might, you know.

"THE COURT: We have got to get something a little bit more definite than that. We really do, because if the State goes through all the trial, goes through all the trial, and you found the man guilty beyond a reasonable doubt--we can't tell the facts now. No way. We are not permitted to. But we have to know whether or not you could follow the law, or whether, because of your personal feelings, even though the law says one thing, whether you would be unable to follow the law, because of your personal feelings, personal scruples, and we have to know that, both the State and the defense, you see.

"We don't care what your answer is. There are no right or wrong answers. We just want to know the truth, and if the State proves to you beyond a reasonable doubt that both those questions should be answered yes, of course, they are entitled to have a juror that could say yes, but if you can't say yes and they should be answered yes, and you cannot say yes, because you are strongly against the death penalty, we want to know that, whether or not you could follow the law.

"THE WITNESS: (No answer.)

"THE COURT: Do you know whether or not you could answer those questions yes, if the evidence requires the answer to be yes?

"THE WITNESS: No.

"THE COURT: No, you don't know if you could answer the questions, or no, you can't do it?

"I don't care what your answer is.

"THE WITNESS: I don't know if I could answer it yes.

"THE COURT: You just don't know at this time?

"THE WITNESS: No.

"THE COURT: Go ahead and ask her some questions, Counsel."

Finally, however, her position solidified to a commitment to vote against the death penalty no matter what the facts showed:

"Q. Okay. Are you saying that your basic feeling is that you are against the death penalty?

"A. Yes.

"Q. Are you saying that no matter what facts I prove to you, that no matter how horrible, that because of your personal scruples that you will vote against the death penalty?

"A. Yes.

"Q. Even if you thought it was a proper case, would you vote against the death penalty because of your personal feelings?

"A. Yes.

"Q. Okay. Are you telling me that you are automatically going to answer no to Questions 1 and 2 because that would result in a life sentence instead of the death sentence?

"A. Yes.

"Q. Okay. We are just trying to be clear, and I'm not trying to confuse you, and I think I understand what you're saying.

"Is there anything I can do to change your mind on that?

"A. No.

"Q. Okay. Then, I think you are clear that you are against the death penalty, and you would vote against it no matter what the facts are, and I don't disagree with that, and I have no further questions.

"THE COURT: You have said now that regardless of what the facts are in any case might show, that you would never assess death as a punishment for crime or participate in a verdict that would result in assessment of death as a punishment for crime; is that correct?

"THE WITNESS: Yes.

"THE COURT: And you know if you were selected to serve as a juror in this case, you would have a duty to not let the mandatory penalty of death or life affect your deliberations on any issue of fact in the case.

"Now are you telling the Judge now that because of your feelings on the death penalty that the mandatory penalty for death or life would affect your deliberations in this case? Is that what you are telling me, because of your feelings as to the death penalty, the mandatory penalty

for death or life imprisonment would affect your deliberations in this case?

"Is that what you are telling me?

"THE WITNESS: Yes.

"THE COURT: You are telling me that you cannot follow your oath, if you took an oath for a true verdict to render in accordance with the law and the evidence in the case. Are you telling the Judge and the Court and all these lawyers and parties here that you could not follow that oath, because of your feelings against the death penalty?

"Are you telling me that?

"THE WITNESS: Yes.

"THE COURT: And again, you're saying that even if the State proves to you beyond a reasonable doubt that each of the two questions that have been gone into thoroughly with you concerning the penalty phase of the trial, if each of those two questions should be answered yes, that you would not answer those questions yes under any circumstances whatsoever, if they would result in the death penalty?

"Is that what you're telling me?

"THE WITNESS: Yes.

"THE COURT: Even though you should answer yes, you would answer no so the death penalty would not have to be assessed by the Judge.

"Is that what you're telling me?

"THE WITNESS: Yes.

"THE COURT: If you would like to ask her some questions, go ahead, Mr. Pizzitola.

RECROSS EXAMINATION

QUESTIONS BY MR. PIZZITOLA:

"Q. Miss Jackson, if you heard testimony about two different murders--

"MR. TAYLOR: Judge, I object to that. That's an improper question. We are talking about capital murder theoretically and not about--

"THE COURT: I'll sustain the objection.

"Go ahead, Counsel.

"MR. PIZZITOLA: Note my exception, Your Honor.

"THE COURT: Yes, sir.

QUESTIONS BY MR. PIZZITOLA CONTINUED:

"Q. Miss Jackson, if you have heard testimony, you are saying regardless of the facts, Miss Jackson, that you would always answer at least one of those no, or is there a fact situation where you could follow the oath and answer both of them yes, even though it would mean the death penalty?

"A. I would probably answer no.

"Q. You would probably answer no.

"A. To one of the questions.

"Q. Would you always answer no regardless of the facts, even if you believed they should be answered yes and you were convinced of that from the evidence?

"A. Yes.

"THE COURT: What was your answer, ma'am?

"THE WITNESS: Yes.

"THE COURT: Yes, you would always answer no; is that what your answer is?

"THE WITNESS: Yes.

"MR. PIZZITOLA: That's all my questions.

"MISS BURKHALTER: The State would move to challenge, Your Honor.

"MR. PIZZITOLA: I would object to that challenge, Your Honor.

"THE COURT: The challenge is hereby granted."

The record supports the trial court's ruling that this individual was subject to challenge for cause. See Porter v. State, 623 S.W.2d 374; Bass v. State, 622 S.W.2d 101; Williams v. State, 622 S.W.2d 116. No Witherspoon error is presented. The ground of error is overruled.

We come next to a group of seven grounds of error challenging admission of confessions and a knife (the murder weapon) recovered as a result of a confession. The core of appellant's position is that the confessions were the product of interrogation conducted after he had requested counsel and the police had refused to provide counsel. He relies on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, in his argument under these grounds of error.

After appellant had been warned by a magistrate, he was cautioned by officer Bostock, who gave the following testimony during the hearing on the motion to suppress:

"A. He was returned to the interview room in the Homicide Division, and we again went over his legal rights to make sure he understood them, sir.

"A. How did you do that? Did you take the warnings from a card? Did you take them from a confession form?

"A. We used the same warning the magistrate did, sir, and went over each point.

"Q. So you read the one that is in State's Exhibit No. 6; is that right?

"A. Yes, sir, it is.

"Q. Did you question him as to whether or not he understood what each one of these rights meant.

"A. Yes, sir, we did.

"Q. Did you tell him that he had a right to employ a lawyer, as reflected in there?

"A. We did, sir, and he said he had a lawyer.

"Q. Did you ask him whether or not he knew he had a right to remain silent?

"A. Yes, sir, we did.

"Q. Did he understand that?

"A. Yes, sir, he did.

"Q. Did you tell him that he had a right to have a court appointed lawyer, if he couldn't afford a lawyer?

"A. Yes, sir, we did.

"Q. Did he understand that concept?

"A. Yes, sir, he replied he had a lawyer.

"Q. He didn't want a court appointed lawyer, as far as you could tell?

"A. He didn't want any lawyer, sir.

"Q. Did you tell him that if he elected not to remain silent, that what he said would be taken down and probably used against him?

"A. Yes, sir, we did.

"Q. Is that reflected on the warning that we are talking about?

"A. Yes, sir.

"Q. Did he say he understood that?

"A. Yes, sir, he did.

"Q. Did he say at that point and time that he wanted to talk to you?

"A. We asked him if he wished to talk to us, after all of this, and he said: Yes, I'll talk to you.

"Q. Did he talk to you freely and voluntarily?

"A. Yes, sir, he did.

"Q. How long did you talk to him while he was there in the interrogation room?

"A. He talked to us until around 3:00 o'clock.

"Q. So this would be from 2:00 o'clock to 3:00 o'clock?

"A. Probably about 1:45 to about 3:00 o'clock, yes, sir.

"Q. What were you talking about then? Were you talking about the previous statement or what?

"A. We talked about the previous statement and some of his background, some of his way of life and so forth, where he lived, about the investigation itself, and then about 3:00 o'clock that afternoon, he looked at us and said: I think I want to talk to my lawyer.

"Q. What did you do then?

"A. I asked him who his attorney was and he said it was Mr. Jennings.

"I pulled out a telephone book, looked up the number, dialed the number, gave him the telephone.

"Q. Is that Tom Jennings?

"A. I believe that's his first name, yes, sir.

"Q. Is that the person you dialed, in any event?

"A. Yes, sir. I called his office at which time I gave Mr. Griffin the telephone, and Detective Schultz and I stepped out of the office.

"Q. What happened then?

"A. He talked on the telephone, sir. We didn't listen to the conversation. We left the door open where we could observe him, but we did not listen to the conversation.

"Q. How long did the conversation take place?

"A. Roughly between five and ten minutes, I believe, sir.

"Q. This would have been sometime after 3:00 o'clock, between 3:00 o'clock--

"A. It was right around 3:00 o'clock when he stated that he would like to talk to his lawyer, that he had better talk to his lawyer, and then, after he hung up, we returned in there, and he advised us that he had, in fact, talked to his attorney, and about 3:30, his attorney called back and asked to talk to him.

"Again, we put him on the telephone and we left the office.

"Q. Between 3:00 and 3:30, did you talk to him about the case?

"A. We talked to Mr. Griffin mostly, I think, about what his attorney was advising him.

"Q. Okay. Then, at 3:30, Mr. Tom Jennings again called the Homicide Office?

"A. Well, Detective Schultz was advised that Mr. Jennings was on the telephone, and then Detective Schultz came back into the interview room and told Mr. Griffin that his attorney wanted to talk to him.

"We again left the interview room and allowed him to talk to Mr. Jennings on the telephone.

"Q. How long did that conversation take?

"A. Just a short conversation, just a minute or two, I believe.

"Q. What happened after he hung up?

"A. We re-entered the interview room and asked him what had happened, and he said Mr. Jennings had told him he was not going to represent him.

"Q. Did you ask him then whether he wanted a lawyer?

"A. Yes, sir. We asked him if he wanted to call another lawyer.

"Q. What did he say?

"A. He said: No. He just didn't want to talk to any lawyers right now.

"Q. Who was present when this was said?

"A. Detective Schultz and I believe Detective Kent had come in by that time, and I don't recall if there was anybody else actually in the room then, sir.

"Q. But, in any event, he said he didn't want any lawyer?

"A. He said he didn't want any other lawyer now.

"Q. Then what happened?

"A. Detective Kent asked me if--When Detective Kent came into the room, he was behind me, and Mr. Griffin smiled at him.

"Detective Kent asked me if I would have any objections if he interviewed him, and I stated: No, and I leaned over and told Detective Schultz that Detective Kent wished to interview him, and Detective Schultz and I stepped out of the room, sir."

These facts contrast sharply with those of Edwards v. Arizona, supra, upon which appellant relies. Appellant did not make a general request for counsel, as Edwards did. Appellant did not say he did not want to talk to the officers, as Edwards did. Appellant did not say he wanted to deal with the police only through counsel, as Edwards did. Appellant's request to consult with his attorney was promptly and fully honored, as Edwards' was not. Appellant was even asked by the officers if he wanted to talk to another lawyer after his previous lawyer declined representation, and appellant explicitly stated he did not want to talk to any lawyer at that time, expressly declining to exercise the right he now asserts was denied him. We find Edwards v. Arizona, supra, is clearly distinguishable and overrule these grounds of error.

In his next two grounds of error appellant relies on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, in his attack on the testimony of two witnesses, a psychiatrist and a clinical psychologist, called by the State on rebuttal after the defense presented the testimony of a psychiatrist at the punishment stage of the trial. We find these circumstances under which the testimony was presented by the State is different from those addressed in the Smith case. In its decision the Supreme Court expressly stated:

"A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce

> any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." (Emphasis added.) 451 U.S. at 468.

Smith does not apply. The grounds of error are overruled.

The last three grounds of error complain of admission of the shirts worn by the two murder victims. Appellant argues they were admitted solely to inflame the jury, contrary to the statement in footnote 1 of Bradford v. State, 608 S.W.2d 918. That case expressly overruled the requirement that bloody clothing must solve some undisputed fact issue before it is admissible. Here the shirts were used to demonstrate the number of stab wounds suffered by the victims, thereby tending to show the location of the wounds, reflecting an intent to kill. It cannot be said the exhibits were offered solely to inflame the jury. Furthermore, it is doubtful that timely objection was made. The witness displayed the exhibits before the jury and described them for over three pages before objection was made at the time they were formally offered. The grounds of error are overruled.

The judgment is affirmed.

ODOM, Judge

(Delivered May 25, 1983)

En Banc

TC-83-21-085

JEFFERY LEE GRIFFIN, Appellant

NO. 68,924 Vs. Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court wrote:

> ". . .[a]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, at 372-376, 60 L.Ed.2d 286, 99 S.Ct. 1755 the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (Citation omitted.)

In the instant case the record shows the appellant asked to talk to his attorney. He conversed over the telephone with attorney Jennings for five or ten minutes. Upon subsequent inquiry by the police officers he told them he had talked with his attorney. Shortly thereafter attorney Jennings called back and talked to the appellant. After the telephone conversation terminated, the police officers re-entered the interview room and asked what happened. When informed by appellant attorney Jennings was not going to represent him, he was asked by the police officers if he wanted to call another lawyer. His response, according to the State's testimony, was that he "just didn't want to talk to any lawyers right now." Thereafter, Detective Kent came into the room and asked to interview the appellant. The other officers left and the confession followed.

It is clear from the testimony quoted by the majority that having exercised his right to counsel, appellant did not initiate further communication, exchanges, or conversation with the police. After his conversations with attorney Jennings, appellant supposedly said he did not want to talk to any lawyer "right now," but he did not say that he wanted to talk to the police. It was the police who continued to initiate the conversation about the offense.

This case cannot be squared with Edwards v. Arizona, supra.

I vigorously dissent to the court's disposition of the grounds of error relating to the admission of the confession.

ONION, Presiding Judge

Clinton, Teague and Miller, JJ., join in this opinion.
(Delivered May 25, 1983)

En banc

NO. 83-5792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFREY LEE GRIFFIN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

MOTION FOR LEAVE TO PROCEED
INFORMA PAUPERIS

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFREY LEE GRIFFIN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

MOTION FOR LEAVE TO PROCEED
INFORMA PAUPERIS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, JEFFREY LEE GRIFFIN, Petitioner in the above entitled and numbered cause, by and through his attorney, STANLEY G. SCHNEIDER, and files this Motion for Leave to Proceed Informa Pauperis, and would show this Honorable Court that Petitioner has been continuously incarcerated since his arrest on March 12, 1979, and is indigent and Petitioner's counsel was appointed by the Court to represent him. Petitioner's Affidavit of Poverty is attached hereto as Appendix "A".

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Court for leave to proceed on appeal informa pauperis.

Respectfully submitted,

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

CERTIFICATE OF SERVICE

On this the 19th day of November, 1983, a true and correct copy of the foregoing was mailed to Leslie Benetiz, Assistant Attorney General of Texas, State Capitol, Austin, Texas.

STANLEY G. SCHNEIDER

APPENDIX "A"

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1983

JEFFERY LEE GRIFFIN,

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

IN FORMA PAUPERIS AFFIDAVIT

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
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ATTORNEY FOR PETITIONER

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1983

JEFFERY LEE GRIFFIN,

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

IN FORMA PAUPERIS AFFIDAVIT

TO THE HONORABLE BYRON R. WHITE, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Fifth Circuit:

Petitioner, Jeffery Lee Griffin, moves that he be permitted to file the attached application for writ of certiorari in forma pauferis and to proceed in forma pauferis. In support of this motion, Petitioner states under oath the following facts:

I, Jeffery Lee Griffin, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes_____ No✓

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   _____
   _____
   _____

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which your received.

   _____
   _____
   _____

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment?
   Yes_____ No✓

   b. Rent payments, interest or dividends?
   Yes_____ No✓

   c. Pensions, annuities or life insurance payments?
   Yes_____ No✓

   d. Gifts or inheritances?
   Yes_____ No✓

   e. Any other sources?
   Yes_____ No✓

   If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

   _____
   _____
   _____
   _____
   _____

3. Do you own cash, or do you have money in a checking or savings account?

   Yes_____ No✓ (Include any funds in prison accounts)

   If the answer is "yes", state the total value of the items owned.

   _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes_____ No ✓

If the answer is "yes", describe the property and state its approximate value _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for prejury.

Jeffery Lee Griffin
JEFFERY LEE GRIFFIN, PETITIONER

THE STATE OF T E X A S §

COUNTY OF Harris §

Jeffery Lee Griffin, Petitioner, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Jeffery Lee Griffin
JEFFERY LEE GRIFFIN, PETITIONER

SUBSCRIBED AND SWORN TO before me on this the 7 day of Oct, 1983.

Notary Public in and for
The State of T e x a s

My Commission Expires: 12-25-86

CERTIFICATE

I hereby certify that the Appellant herein has the sum of $15.45 on account to his credit a the Inmate Trust Fund, Texas Department of Corrections institution where he is confined. I further certify that Appellant likewise has the following securities to his credit according to the records of said none institution:

Authorized Officer of
Institution